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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
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	)	
Second Periodic Review of the	)	MB Docket No. 03-15
Commission's Rules and Policies	)	
Affecting the Conversion	)	RM 9832
To Digital Television	)	
	)	
	)	

To: Office of Secretary
Attention: The Commissioners

PETITION FOR RECONSIDERATION

Paxson Communications Corporation
601 Clearwater Park Road
West Palm Beach, FL 33401

November 2, 2004

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SUMMARY

In its *Order* setting forth procedures for transitioning to a digital television service, the **Commission defaulted on its statutory obligation** to preserve over-the-air analog service through the transition for viewers with no other source for television service. In its singular focus on implementing a television system for the future, the Commission unreasonably ignored the need to preserve the analog service upon which millions rely at present. The *Order* fails to deal with the immediate prospect of displacement of over-the-air analog service to free Channels 63, 64, 68, and 69 for public safety at a date that could be many years before the transition ends.

Senate passage on September 29, 2004, of the Burns Amendment to the McCain Save Lives Bill underscores the prospect that a nation at war may demand premature displacement of incumbents to free public safety spectrum. Any such decision likely will also adversely affect licensees on adjacent channels 62, 65 and 67 by requiring that they curtail their operations. Yet, the *Order* fails to make any provision for substitute spectrum, waivers, compensation, or burden-sharing mechanisms for selectively displaced licensees. The Commission cannot reasonably ignore its statutory obligations and its own policies that require it to maintain through the transition period those analog television services upon which millions of our citizens now rely.

Without specific mechanisms in place to ensure that the Commission promptly can assign these licensees a substitute channel or otherwise mitigate the burden of selective displacement, the rigid system of elections and priorities adopted to implement a television system of the future will impede the Commission from maintaining existing over-the-air analog service through the transition period. Effective relief for prematurely displaced licensees requires a Commission decision on the avenues and terms under which it will make displacement relief available to allow planning by licensees. By failing to address in the *Order* any mechanism to provide relief

to these licensees, the Commission made a decision by default to allow the entire burden of selective displacement to fall upon this small group of licensees and to foreclose its own ability to meet its statutory obligations to preserve television broadcasters' ability to serve their analog over-the-air audiences through the transition period. Portions of the *Order*, indeed, perversely discourage the availability of channels for displaced licensees and instead demand that the channels be retained and occupied by those who neither need nor want them.

Selective displacement and the silencing of identifiable broadcasters' ability to reach their analog audiences has serious constitutional implications and contravenes the Commission's own spectrum realignment policies and core broadcast policies of promoting competition and diversity. The prospect of immediate displacement is open and obvious. The Commission has not only ample authority from Congress to mitigate the otherwise disastrous effects that selective analog termination would have for licensees and their audiences, but also an obligation to use that authority. The Commission cannot delay action until it is too late. It must act now to reconsider its order and issue an order on reconsideration providing that: (1) licensees losing their analog spectrum before the end of the DTV transition will be given a replacement analog channel; (2) all stations will be allowed early flash-cut authority to free up analog spectrum; (3) stations that lose their analog spectrum will be granted liberal rule waivers to allow the resumption of service on displacement channels; and (4) stations that lose their analog spectrum and cannot be accommodated with another channel will be compensated by using procedures previously used in the Qualcomm pioneer preference.

TABLE OF CONTENTS

Page

Before the
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In the Matter of	)	
	)	
	)	
Second Periodic Review of the	)	MB Docket No. 03-15
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Affecting the Conversion	)	RM 9832
To Digital Television	)	
	)	
	)	
	)	

To: Office of Secretary
Attention: The Commissioners

PETITION FOR RECONSIDERATION

Paxson Communications Corporation ("PCC), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for reconsideration of the Commission's above-referenced Report and Order in MB Docket No. 03-15 (the "*Order*").[1]

In its *Order* setting forth procedures for transitioning to a digital television service, the Commission defaulted on its statutory obligation to preserve over-the-air analog service throughout the transition for viewers with no other source for television service. In its singular focus on implementing a television system for the future, the Commission unreasonably ignored the need to preserve the existing analog service upon which millions rely. The *Order* fails to deal with the immediate prospect of displacement of over-the-air analog service now carried on Channels 63, 64, 68, and 69 at a date that could be many years before digital receiver penetration

[1] Pursuant to 1.429 of the Commission's Rules, petitions for reconsideration in rule makings are due 30 days after the date of public notice as defined by 1.4(b). Under 1.4(b)(1), the date of public notice is the date of publication in the *Federal Register* for documents in a rule making proceeding. Notice of the Commission's *Order* in this docket was published in the *Federal Register* on October 4. Accordingly, this Petition for Reconsideration is timely filed.

levels in their markets reach the 85 percent level that triggers the end of the transition and the termination of analog transmission by all licensees.

Senate passage on September 29, 2004, of the Burns Amendment to the McCain Save Lives Bill[2] confirms that national priorities may demand premature displacement of incumbent broadcasters to free up channels 63, 64, 68 and 69 for public safety use. Any such decision likely will also adversely affect licensees on adjacent channels 62, 65 and 67 by requiring that their operations, too, be curtailed. Yet, the *Order* fails to make any provision for substitute spectrum, waivers, compensation, or burden-sharing mechanisms for licensees whose analog over-the-air channel may be subject to selective displacement. The Commission cannot reasonably ignore its statutory obligations and its own policies that require it to maintain existing analog television services throughout the transition period. Without specific mechanisms in place to assign these licensees substitute channels or otherwise mitigate the burden of selective displacement, the rigid system of elections and priorities adopted to implement the television system of the future[3] will impede the Commission from maintaining current levels of service throughout or after the transition period.

The Commission promised in 1997 to address how to accommodate or compensate television broadcasters displaced by the allocation of their spectrum for public safety use. The Commission has not done so; and, in the *Order*, it ignored its obligation to preserve analog service in the face of a known prospect that a nation at war may require immediate use of the

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[2] Senate Amendment No. S.AMDT.3773 amending Senate Amendment No. S.AMDT 3766 to S.2845 (to reform the intelligence community and the intelligence and intelligence-related activities of the United States Government, and for other purposes), adopted September 29, 2004. See 2004 *Cong. Rec.* pp. S9967-9969 (September 29, 2004).

[3] *See, e.g., Order* at ¶¶ 78-87.

spectrum those broadcasters now occupy, as, indeed, the Burns Amendment proposes. The prospect of displacement for many licensees in the 700 MHz band lies close at hand. By failing to address in the *Order* any mechanism to provide relief to these licensees, the Commission made a decision by default to allow the entire burden of selective displacement to fall upon this identifiable group of licensees. Effective relief for prematurely displaced licensees requires planning by the licensee and a Commission decision on the avenues and terms under which it will make displacement relief available. By failing to act, the Commission is foreclosing its own ability to meet its statutory obligations to preserve television broadcasters' ability to serve their analog over-the-air audiences through the transition period. Portions of the *Order*, indeed, perversely discourage the availability of channels for displaced licensees and instead demand that the channels be retained and occupied by those who neither need nor want them.

Selective displacement and the silencing of identifiable broadcasters' ability to reach their analog audiences has serious constitutional implications and contravenes the Commission's own spectrum realignment policies and core broadcast policies of promoting competition and diversity. The prospect of immediate displacement is open and obvious. The Commission has not only ample authority from Congress to mitigate the otherwise disastrous effects that selective analog termination would have for licensees and their audiences, but also an obligation to use that authority. It must act now to reconsider its order and issue an order on reconsideration providing that: (1) licensees losing their analog spectrum before the end of the DTV transition will be given a replacement analog channel; (2) all stations will be allowed early flash-cut authority to free up analog spectrum; (3) stations that lose their analog spectrum will be granted liberal rule waivers to allow the resumption of service on displacement channels; and (4) stations that lose their analog spectrum and cannot be accommodated with another channel will be

compensated by the Commission using procedures previously approved for the Qualcomm pioneer preference.

I. The Commission Has a Statutory Obligation to Preserve Existing Analog Over-the-Air Service Throughout the Transition Period So That No Stations Are Selectively Silenced.

Congress directed the Commission not just to implement a transition to digital television, but to implement that transition subject to a specific limitation on the extent to which the transition can impair effective access to analog television service by the public. As PCC pointed out in its comments in this proceeding, Section 309(j)(14)(B)(iii) sets the 85 percent figure as the minimum proportion of broadcasters' current markets that the Commission must protect.[4] Pursuant to Section 309(j), the Commission must minimize any disruption to the traditional American broadcast system. Congress directed not only an efficient transition to digital service, but one that did not deprive more than 15 percent of citizens of the ability to receive over-the-air analog service. Even then, Congress permits that disenfranchisement only at the end of the transition period, when citizens will have had ample opportunity to acquire digital receivers, measured by the 85 percent that will have done so. The ultimate goal of the digital transition is to provide superior range and quality of over-the-air television services to the American public from the licensees that serve them. Selective termination of existing over-the-air analog service before the transition date would deprive many Americans of any service at all from television stations upon which they have come to rely and flies in the face of manifest legislative intent.

For channels slated for eventual public safety use, Congress has made its intention even more pointed. Whatever occasion may require that these channels be immediately available to public safety use, the Commission cannot conclude that Congress intended that the full impact of

[4] PCC Comments at 17.

the spectrum shift fall upon the incumbent analog broadcasters. To the contrary, Congress expressly gave the Commission exceedingly strong authority to avoid or mitigate any service loss prior to the transition date. In the Auction Reform Act of 2002, Congress limited the waivers that the Commission could grant for

> any television broadcast station licensee assigned to any of channels 52-69 to utilize any channel of channels 2-51 that is assigned for digital broadcasting in order to continue analog broadcasting during the transition to digital broadcasting . . . .[5]

The Auction Reform Act, however, expressly exempts from these limitations displacement relief necessary to make channels 63, 64, 68, and 69 available for public safety use. Thus, Congress explicitly has recognized that, to allow these licensees to continue analog over-the-air service during the transition, the Commission may

> waive or otherwise reduce –
>
> (1) the spacing requirements provided for analog broadcasting licensees within channels 2-51 as required by Section 73.610 of the Commission's rules (and the tables contained therein) (47 CFR 73.610), or
>
> (2) the interference standards provided for digital broadcasting licensees within channels 2-51 as required by sections 73.622 and 73.623 of such rules (47 CFR 73.622, 73.623) . . . .

Congress specifically authorized the Commission to grant these waivers to permit continued analog service by stations displaced to make channels 63, 64, 68, and 69 available for public safety, including those displaced on adjacent channels, even "if such waiver or reduction will result in any degradation in or loss of service, or an increased level of interference, to any television household . . . ."[6] The Commission scarcely could have any stronger statement that

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[5] Auction Reform Act of 2002, Pub. L. No. 107-195, § 6, 116 Stat. 715, 717-718 (2002).

[6] *Id.*

Congress expects the Commission to grant waivers even of extraordinary scope to accommodate these displaced licensees to ensure that they are not foreclosed from offering effective over-the-air analog services to the public throughout the transition period. This should be clearly stated as a priority of the Commission on reconsideration and the mechanisms to implement this must be spelled out.

II. In the *Order*, the Commission Defaulted on Its Statutory Obligation to Provide for Licensees in the 700 MHz Band to Continue to Serve Their Over the-Air Analog Audiences During the Digital Transition Period, Notwithstanding the Imminent Early Displacement of Licensees on Channels 63, 64, 68 and 69.

The *Order* marks the Commission's last meaningful opportunity to fulfill its statutory obligations to continue analog over-the-air service through the transition period and still meet immediate demands for public safety spectrum. The Commission ignored that opportunity in the *Order*, and the Commission now must reconsider its decision and fulfill both obligations. The Commission has long been aware, first, that public safety needed channels 63, 64, 68, and 69, and, second, that the Commission has a statutory obligation to preserve the ability of television broadcasters to reach their over-the-air analog audiences through the end of the digital transition period. Nevertheless, the Commission has failed to act.

In the Budget Act of 1993, Congress conditioned the Commission's authority to auction licenses on the Commission's development of a plan to ensure that "public safety" spectrum needs were met through 2010.[7] The Commission's own advisory group recommended in 1996 that an additional 25 MHz of spectrum be made available to public safety no later than 2001.[8]

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[7] Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI, § 6002, as codified at 47 U.S.C. § 309(j)(10)(B)(iv).

[8] Report and Plan for Meeting State and Local Government Public Safety Agency Spectrum Need Through the Year 2010, 10 FCC Rcd 5207 (1995).

The Commission has targeted channels 60-69 for public safety since 1996.[9] In the *Sixth DTV Report and Order*, the FCC stated that it would initiate a new proceeding to determine how to allocate spectrum recovered on channels 60-69 and would consider allocating 24 MHz of this spectrum for public safety.[10] The Commission promised to consider "at a later date" how to compensate incumbents displaced or relocated from these frequencies. That "later date" has never come, and by failing to make a decision in the *Order*, the Commission now has made an insupportable decision by default.

The Budget Act of 1997 directed the FCC to reallocate 24 MHz of the spectrum recovered at channels 60-69 for public safety use and to reallocate the remaining 36 MHz for auction.[11] The Commission selected the channels for reallocation to public safety in its 1998 Reallocation Order.[12] It did so knowing that throughout the digital transition period the public would depend on television broadcasters in that band for over-the-air analog service – service that the Commission had a statutory obligation to preserve through the several more years remaining for the digital transition.

The events of September 11, 2001, which destroyed PCC's own New York area transmission facilities, put into sharp relief the prospect for an immediate call on channels 63, 64, 68, and 69 for public safety needs. The Commission still did not address alternatives to

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[9] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Further Notice of Proposed Rulemaking*, 11 FCC Rcd 10968, ¶ 6 (1996).

[10] Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service, *Sixth Report & Order*, 12 FCC Rcd 14588, ¶ 80 (1997).

[11] Balanced Budget Act of 1997, Pub. L. No. 105-33, § 3004, as codified at 47 U.S.C. § 337(a)(1).

[12] Reallocation of Television Channels 60-69, the 746-806 MHz Band, *Report & Order*, 12 FCC Rcd 22953 (1998).

accommodate competing needs of public safety and of broadcasters displaced to free public safety spectrum, even though public safety needs had become critical and Congress, in the Auction Reform Act of 2002, had endorsed even extraordinary waivers to ensure the continuity of those broadcasters' analog over-the-air service through the digital transition period.

The Senate passage of the Burns Amendment shows that the prospect of an immediate call for channels 63, 64, 68, and 69 is imminent. The Commission cannot reasonably put off confronting its obligations yet again and assume that a statutory change requiring the immediate clearing of the affected channels would nullify its obligation to spread or mitigate the burden of selective displacement. It is scarcely conceivable that Congress would specifically target an identifiable group of First Amendment speakers and direct the Commission to ensure that only those identified voices would be silenced without relief. For example, the Burns Amendment does not require the Commission to forego alternatives that would minimize the impact upon displaced licensees or the public interest in general resulting from the early surrender of analog authority to accommodate public safety.[13] The Burns Amendment even includes authority to waive the channel clearance requirements to "avoid consumer disruption" while allowing public safety entities to use the frequencies.

Since 1998, the Commission has known that public safety needed spectrum immediately and that, on the Commission's then-present and still present course, the digital transition date would not arrive and the spectrum would not become available for many more years. **Yet, despite its own promise in 1997 to consider means to avoid having the full weight of analog channel loss fall on selectively displaced licensees, the Commission has taken no significant**

[13] Rather, the Commission is directed by December 31, 2007, only (1) to complete the return of those channels, and (2) to complete the assignment of those channels for use by public safety.

steps to determine how it would preserve over-the-air analog services for 700 MHz band broadcast licensees, compensate displaced licensees, and still make that very spectrum available for public safety. The Commission has two statutory responsibilities – one to meet the spectrum needs for public safety and the other to continue over-the-air analog service through the transition period. Unless the Commission delays until it is no longer possible to take effective action, the Commission has the tools, the authority, and the opportunity – albeit a last opportunity – to reconcile those obligations. It is arbitrary and capricious for the Commission to delay such a critical matter until it is too late to do more than pick which of two statutory obligations to shirk.

III. The Commission Cannot Lawfully Impose the Full Burden of Early Displacement on Licensees Operating on Channels 63, 64, 68 and 69.

The Commission cannot ignore an imminent public safety need for 700 MHz spectrum, refuse to provide for the continuity of over-the-air analog service by displaced broadcasters, and assume it can deal with an extreme event by placing the entire burden of early displacement on those licensees and on the members of the public that depend upon them for over-the-air analog service. The Commission has a statutory duty to preserve over-the-air analog service until the conditions for the end of the digital transition period have been met, and there is ample evidence that a national event, Congressional legislation, or a combination of the two may necessitate premature displacement of licensees on channels designated for ultimate public safety use. Selective deletion of 700 MHz licensees' analog service of not only raises serious constitutional questions that the Commission has an obligation to avoid, but also runs counter to all of the Commission's previous approaches to reallocating spectrum occupied by a primary service and undercuts the core Commission objectives of diversity and competition in broadcasting.

A. The Commission Has an Obligation to Avoid Constitutional Questions in Implementing Congressional Enactments.

Reviewing courts deny deference to agency actions that raise serious constitutional questions that the agency could have avoided, even if the agency's proposed action is not conclusively unconstitutional.[14] Under this principle, the Commission has an obligation to interpret and implement the Burns Amendment or any other occasion for the selective termination of analog service to avoid not only actions that would ultimately be determined unconstitutional, but also those that raise serious constitutional questions in the first place. Selective displacement raises significant constitutional issues under both the Takings Clause and under the Equal Protection Clause and the First Amendment. Here, the Commission has both the obligation and ample alternatives to avoid questions of constitutional infirmity.

1. Selective Displacement of 700 MHz Licensees' Analog Stations Without Compensation Raises Serious Questions Under the Fifth Amendment "Taking Clause."

For the last two decades, the Commission, the courts, and Congress have recognized that licensees have a species of property rights associated with their Commission licenses. The Commission has auctioned off licenses; permitted the private leasing of broad categories of non-broadcast spectrum; recognized that private parties may hold a security interest in the "proceeds" of the sale of an FCC license; allowed the sale of permits for "unbuilt" stations at a profit; eliminated comparative renewal challenges; solidified broadcast licensees' "renewal expectancy" by eliminating comparative renewal hearings; and, most recently, held that the Communications

[14] *Chamber of Commerce v. FEC*, 69 F3d 600, 605 (D.C. Cir. 1995) (citing *DeBartolo, supra*). *See also U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999). Furthermore, courts will not readily construe a statute to grant an agency authority to act in a manner that creates serious constitutional questions. *See, e.g., Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trade Council,* 485 U.S. 568, 575 (1988) (citing *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490 (1979)).

Act allows the holding of security interests in Commission licenses themselves. FCC licenses long have received "property-like" treatment for purposes of tax laws and bankruptcy laws.

In its recently issued *Rural Service Order*,[15] the Commission, through rule making, allowed Rural Utility Service ("RUS") to take direct security interests and liens in FCC licenses themselves. In so doing, the Commission necessarily held that the question of whether a party can hold a security interest – and thus a property interest – in a Commission license is a question of administrative discretion, not one governed by Communications Act. Indeed, the Commission acknowledged that "a licensee holds certain 'spectrum usage rights,' as defined within the terms, conditions, and period of the FCC license at the time of issuance."[16] It is true that the Commission maintained in the Rural Service Order that it was establishing "a prohibition on anyone other than the federal government holding a property interest in something as closely associated with spectrum as an FCC license."[17] But, significantly, it was the Commission itself drawing that discretionary line in a rule making, having already determined that the Communications Act itself imposes no impediment to the holding of security interests in FCC licenses. If, as the Commission has affirmed, the Communications Act does not forbid the agency from bestowing property rights in licenses on selected holders, then the question of what property right a licensee has in its authorization is not a question of what the statute permits, but one of the reasonableness of the Commission's line-drawing. In fact, the Commission itself has

[15] Report and Order and Notice of Proposed Rule Making, Docket No. WT 02-381 *et al.* (Facilitating the Provision of Spectrum-Based Services to Rural Areas), FCC 04-166 (released September 27, 2004).

[16] *Id.* at ¶ 55.

[17] *Id.*

recognized for almost a decade that it can take direct security interests – a "property" interest – for its own benefit in licenses auctioned under its installment sale program.[18]

The Commission cannot avoid entirely the compensation implications of the Fifth Amendment "Takings" Clause solely by defining as "not property" that which Congress, the Commission and the courts increasing have recognized as having the common law and common sense attributes of property. In its insistence that FCC licenses are "not property," the Commission is passing the limit of plausible deniability through mere labeling. The Commission, at Congress's direction, auctions licenses and receives money in exchange. A purchaser at auction purchases not only a right to use the spectrum for a stated term, but also an expectancy of renewal for future terms if performance standards are met. It is implausible that, at the conclusion of an auction and the payment of the agreed bid, Congress immediately could dispossess the winner and re-auction the spectrum to another without any economic obligation to a dispossessed license holder that had met its end of the bargain. Common sense and basic fairness declare that the bidder purchased something in that transaction. Indeed, in the broader scheme of which selective reclamation of channels 63, 64, 68, and 69 is a part, Congress is seeking additional spectrum for purposes of holding an auction to raise money for the U.S. Treasury, and the assignment of spectrum for public safety use makes it possible to auction other spectrum in the same block to raise revenue for the federal government. If the Commission

[18] Although the case was decided on other grounds, the Supreme Court, in overturning a decision allowing the FCC to revoke the licenses of a bankrupt for failure to make installment payments during bankruptcy, observed: "It is neither clear that a private party *can* take and enforce a security interest in an FCC license . . . nor that the FCC *cannot*." *FCC v. NextWave Personal Communications, Inc.*, 537 U.S. 293, 307 (2003).

permits selective displacement without some form of compensation, a *bona fide* Fifth Amendment Taking claim would arise.

2. Selective Displacement of 700 MHz Licensees' Analog Stations to Free Channels 63, 64, 68 and 69 Raises Serious Issues Under the Equal Protection Clause and the First Amendment.

Although courts applying Equal Protection analysis generally scrutinize conventional economic regulation against a "minimum rationality" criterion, the selective termination of analog over-the-air television voice requires more than "minimum rationality" review. The Equal Protection Clause requires heightened judicial scrutiny for governmental discrimination against constitutionally protected activities. Laws that burden First Amendment-related activities thus trigger more rigorous review than similar restrictions on purely economic activities. For example, "laws that single out the press, or certain elements thereof, for special treatment pose a particular danger of abuse by the State" that require "heightened scrutiny," often termed "intermediate scrutiny."[19] Under this heightened scrutiny, even content neutral regulations that single out a medium must be "narrowly tailored to" and "no greater than is essential to furtherance" of a "substantial" governmental interest.[20]

The courts have given the Commission greater latitude to regulate broadcasting than any state legislature would enjoy in the regulation of printed or other non-broadcast speech. Nevertheless, broadcast regulation affecting the First Amendment activities of broadcasters enjoys a level of protection under the Equal Protection Clause higher than the "minimum rationality" standard governing purely economic regulation, as the U.S. Court of Appeals for the D.C. Circuit held in *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988). In

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[19] *Turner Broadcasting System v. FCC*, 512 U.S. 622, 640-41 (1994).

[20] *Id.* at 662.

that decision, the Court dealt with a challenge to an act of Congress – the so-called "Hollings Amendment" – that forbade the FCC from granting pending requests for waiver of the newspaper/broadcast cross-ownership rule. Although phrased in general terms, the legislation actually applied only to an identifiable applicant. The Court concluded:

> We believe that even in broadcast regulation the First and Fifth Amendments demand a better fit between the law and its asserted legitimate purposes than we can find in the Hollings Amendment.[21]

The Court applied "more than minimal rationality" scrutiny and inquired into "how well [the Amendment's] aim corresponds with any legitimate public purpose."[22]

The Court also applied "more than minimal rationality" scrutiny in *Greg Ruggiero v. FCC*, 317 F.3d 239 (D.C. Cir. 2003), when the Court addressed a constitutional challenge to the restriction on the issuance of low power FM licenses to anyone who had engaged in past unlicensed operation. The Court held that the appropriate basis for review "occupies a ground somewhere between" minimal rational basis scrutiny and intermediate scrutiny.[23] "Minimal rational basis" scrutiny did not meet constitutional requirements because the restriction at issue prevented former operators of unlicensed radio stations from holding a broadcast license at all.[24] The same Court again made reference to this elevated level of rational basis scrutiny in *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002). Although the Court in *Sinclair*

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[21] *News America Publishing, Inc. v. FCC*, 844 F.2d 800, 805 (D.C. Cir. 1988).

[22] *Id.* at 814.

[23] *Grey Ruggiero v. FCC*, 317 F.3d 239, 243 (D.C. Cir. 2003).

[24] *Id.* at 245. "It is the would-be speaker's inability to broadcast at all that takes a case outside the "structural" framework and makes minimal scrutiny insufficiently rigorous to protect the freedom of speech protected by the First Amendment." *Id.* Applying this higher standard of Equal Protection scrutiny, the *Ruggiero* Court ultimately found the statute constitutional, because the complete prohibition against former pirates holding licenses bore a reasonable fit to the government's interest in deterring such unlicensed broadcasting.

did not find that a single class of broadcasters had been singled out by the rule at issue, the Court stated that "more than minimal scrutiny may be required when a class of broadcasters is singled out."[25]

The early termination of analog authority for television licensees now operating on channels 63, 64, 68 and 69 singles out a specifically identifiable class of broadcasters, a recognized ground for applying more than "minimal rational basis" scrutiny. Selective displacement of these licensees' analog channels without provision for continued service on another channel would silence First Amendment speakers by foreclosing them from reaching an over-the-air audience dependent on analog receivers, while other licensees will be able to continue to reach that portion of the audience. This silencing, combined with the narrow focus on an identifiable class of targeted television licensees on channels 63, 64, 68, and 69, justifies "more than minimal rational basis" scrutiny, particularly given that early return would silence currently active speakers. The Commission must avoid the important Equal Protection questions raised by selective displacement and instead institute ameliorative policies like those discussed below.

B. Placing the Entire Burden of Channel Displacement on 700 MHz Licensees Alone Is Arbitrary and Capricious Because It Contravenes Well-Established Commission Policies.

The Administrative Procedure Act directs a reviewing court to "hold unlawful and set aside agency action, findings and conclusions" found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or "contrary to constitutional right." Administrative Procedure Act, 5 U.S.C. § 706(2)(A), (B). A reviewing court will require that the agency "examine the relevant data and articulate a satisfactory explanation for its action

[25] *Sinclair Broadcast Group v. FCC*, 284 F.3d 148, 168 (D.C. Cir. 2002).

including a 'rational connection between the facts found and the choice made.'"[26] Moreover, an agency must reconcile its decisions with its existing rules and practices unless it provides a cogent explanation for departing from them. This is no less true when, as here, the agency has made a decision by default. It is well-established that the failure to exercise discretion is itself an abuse of discretion.[27]

Premature displacement of 700 MHz analog licensees before the end of the transition would nullify retroactively the authority that the Commission, consistent with statute, previously gave these licensees to continue over-the-air analog transmission until the transition ends. Constitutional and judicial restraints limit the retroactive application of legislative rules. Section 551(4) of the Administrative Procedure Act defines a legislative rule as:

> the whole or a part of an agency statement of general or particular applicability and *future* effect designed to implement, interpret, or prescribe law or policy[28]

Courts have emphasized that this provision requires administrative rules to be primarily concerned with the future rather than with past conduct.[29] Retroactive rules are thus viewed with judicial suspicion and are subject to strict scrutiny because they interfere with the legally induced, settled expectations of private parties. The Supreme Court has recognized that "[t]he protection of reasonable reliance interests is not only a legitimate governmental objective; it

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[26] *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 43 (1983) *(quoting Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)).

[27] *See, e.g., Miami Nation of Indians of Indiana, Inc. v. United States Dept. of the Interior*, 255 F.3d 342, 350 (7th Cir. 2001).

[28] 5 U.S.C. § 551(4) (emphasis added).

[29] *See, e.g., American Express Co. v. United States*, 472 F.2d 1050 (C.C.P.A. 1973); *Energy Consumers & Producers Ass'n, Inc. v. Department of Energy*, 632 F.2d 129 (Temp. Emer. Ct. App. 1980).

provides 'an exceedingly persuasive justification.'"[30] This Commission, too, has recognized that retroactive application of rules and procedures is inequitable and disruptive to business.[31]

By failing in the *Order* to address the need to protect existing analog service from the imminent and demonstrable threat of immediate displacement, the Commission made a decision by default that it would allow the full burden of selective displacement to fall on those out-of-core stations. That decision not only flouts statutory obligations and implicates serious constitutional questions, but also flies in the face of the Commission's own policies. In prior spectrum realignment proceedings, the Commission has carefully avoided the displacement of incumbent licensees unless it made alternative spectrum available with ample time for transition and, in many cases, provided for compensation for the costs of the transition, usually through provisions for new users to negotiate early transition agreements with willing incumbents. The need for adequate advance provision is especially acute for the broadcast services, because large numbers of citizens depend upon the service directly and selective government action against First Amendment speakers raises constitutional questions.

When the Commission previously has had to relocate incumbent licensees, it has taken great pains to ensure continuity of operations and the provision of equivalent substitute spectrum. For example, when the Commission relocated the entire Digital Electronic Message (DEMS) service from the 24 GHz band to the 18 GHz band to avoid interference to military satellite services, it provided a four-fold increase in spectrum to make sure to maintain the same quality

[30] *Heckler v. Mathews*, 465 U.S. 728, 746 (1984) (citation omitted).

[31] *Cf. Amendments of Parts 20 and 24 of the Commission's Rules,* 11 FCC Rcd 7824, 7887 (1996); *CATV of Rockford, Inc.*, 38 FCC 2d 10, 15 (1972), *recons. denied*, 40 FCC 2d 493 (1973).

of system performance in the new bands.[32] Because the interference issue implicated specific national security interests of the United States, the Commission ordered the spectrum shift under the "military affairs" exception to the Administrative Procedures Act,[33] without prior notice and comment rule making.

When reallocating occupied spectrum for non-governmental users, the Commission for more than a decade has followed the "Emerging Technologies" pattern set in the reallocation of 2 GHz spectrum from fixed microwave to PCS.[34] There, the Commission specified a two-year period for negotiation between incumbents and new users over the terms and costs of incumbents' relocation, with the proviso that the new applicant bear the entire cost of relocation. The Commission has adhered to the "Emerging Technologies" paradigm in subsequent spectrum realignments, including the relocation of the broadcasting auxiliary service ("BAS") to new spectrum for the benefit of the Mobile Satellite Service ("MSS").[35] There, the Commission rejected arguments that BAS incumbents should bear their own costs of relocation, set a reasonable transition period, and, even though the public did not directly rely upon the BAS service, found that "it is essential that we ensure the continuity of BAS during the transition."[36] If established Commission policies required such careful preservation of a microwave service

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[32] *Relocation of the Digital Electronic Message Service*, Memorandum Opinion and Order, ET Docket No. 97-99, 13 FCC Rcd 1514 (1998), at ¶ 13.

[33] *Id.* at ¶ 9.

[34] Redevelopment of Spectrum to Encourage Innovation, Third Report and Order and Memorandum Opinion and Order, 8 FCC Rcd 6589 (1993) ("*Emerging Technologies Order*").

[35] *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile Satellite Service*, First Report and Order in ET Docket No. 95-18, 12 FCC Rcd 7388 (1997) ("BAS Order"); Second Report and Order in ET Docket No. 95-18, 15 FCC Rcd 12315 (2000) ("BAS Second Report").

[36] BAS Second Report at ¶ 28.

limited to intra-company use, far greater protection is warranted to preserve a service that members of the public depend upon for news and information and that the First Amendment protects.

The Commission's default decision to deny displaced 700 MHz licensees either accommodation or compensation for analog service termination also violates longstanding Commission goals of promoting diversity and competition in broadcast markets. The broadcasters on the targeted channels, such as PCC and Univision and their network affiliates, contribute to diversity by serving segments of the public with needs and interests that other broadcast outlets do not address. PCC, for example, uniquely provides programming for the entire family, without the sexual and violent content so prevalent on most major broadcast networks. Univision serves a Hispanic audience with Spanish language television programming. To remove entirely such voices from the analog over-the-air market while others continue in the market runs counter to the goal of viewpoint diversity, especially given that the targeted broadcasters have audiences more reliant upon over-the-air analog service than is the television broadcast audience generally.

Selective termination also undermines the goal of a competitive broadcasting market in which marketplace forces spur service quality and encourage the provision of both broad-appeal services and more specialized services to meet all significant needs of the viewing public. If the Commission makes no provision for preserving displaced licensees' analog service, then government fiat – or, more properly, Commission default – will determine what services the public will retain, instead of the marketplace. The at-risk stations, moreover, disproportionately direct their service at family viewing and Spanish language audiences and occupy channels least favorable for reaching an over-the-air audience, yet a larger portion of their viewership relies

upon over-the-air analog transmission to receive their signals. Given their inferior channel assignments and their dependence on an over-the-air analog audience, these stations can least bear the economic loss from selective displacement, especially on the heels of enormous DTV implementation expenses that produce no current revenue and that these stations will not recover for many years. Thus, failure to make any provision for these displaced licensees to continue analog over-the-air service risks more than even their service during the transition period. Many of these stations may never resume their present levels of service to the public after the economic body-blow of a multi-year loss of their primary audiences.

IV. The Commission Must Implement Alternative Mechanisms to Mitigate or Spread Equitably the Burdens Falling on 700 MHz Licensees as a Result of Their Selective Displacement.

The Commission has many regulatory tools that it could deploy to safeguard over-the-air analog service during the transition, if only it would do so. The Commission's failure to consider available alternatives to regulatory action is fatal to the validity of its *Order*. As the D.C. Circuit has pointed out,

> a rule is irrational . . . if a party has presented to the agency a narrower alternative that has all the same advantages and fewer disadvantages, and the agency has not articulated any reasonable explanation for rejecting the proposed alternative.[37]

The *Order* not only fails to address means to fulfill the Commission's statutory obligation to preserve over-the-air analog service for displaced licensees, but actually impedes the achievement of that goal through provisions that discourage the availability of channels that could allow 700 MHz licensees with primarily over-the-air audiences to continue to reach them. The *Order* relegates 700 MHz analog licensees to the prospect of immediate loss of the ability to

[37] U.S. Telecom Association v. FCC, 359 F.3d 554, 571 (D.C. Cir. March 2, 2004), *cert. denied*, 2004 U.S. Lexis 6710, 6711, 6712 (Oct. 12, 2004).

serve their audiences, without mitigation, burden-sharing, or compensation, despite the Commission's statutory obligation to preserve over-the-air analog service through the transition period and despite available options.

For relief to displaced stations to be effective, both broadcasters and the public need to know what alternatives the Commission will consider and on what terms. Further delay in setting forth cogent options and standards for relief in the face of an immediate prospect of displacement is, in fact, a denial of relief. As the Burns Amendment demonstrates, a displacement event may well intervene with little prior notice or opportunity for the Commission and displaced licensees to provide for the continuation of service. The Commission is thus obligated to reconsider the *Order* and to implement the available alternatives less drastic than complete selective displacement.

A. The Commission Can Expand the Availability of Substitute Analog Channels During the Digital Transition by Allowing Stations to Operate Either Exclusively in Digital or in Analog Pending a "Flash Cut" to Digital at the End of the Transition Period.

As the Commission has recognized, television stations differ in the extent to which their core audiences have access to digital television receivers or to multi-channel video program transmission systems that could deliver a usable signal to an analog receiver. No one has a greater stake in maintaining a television station's access to its audience than the licensee itself. Thus, it is manifestly reasonable for the Commission to allow licensees themselves to decide whether it is in their viewers' interest for them to abandon their analog channels and "flash cut" to digital service. Every licensee who decides that it is in its interest to "flash cut" produces a channel available to accommodate a displaced licensee with an audience dependent upon analog service. The *Order*, however takes a decidedly different tack.

The *Order* limits "flash cut" authority to only two classes of stations: those with out-of-core DTV channels that are not affiliated with one of the top-four major television networks and satellite stations. Even those stations, however, have no assurance that they may flash cut, and the Commission has categorically excluded flash-cut authority for any stations admonished for failure timely to construct digital facilities. Phrased differently, although stations in the 700 MHz band face an imminent need to figure out how they will serve their over-the-air audiences when displaced, the Commission made no provision for them. Thus, the *Order* leaves them to rely, when displaced, solely on digital facilities that their core audiences cannot receive. Stations that no longer need or can no longer afford dual facilities, however, cannot escape the cost of dual mode operation unless they fall into two narrow categories. This is a perverse reversal of reason. The *Order* forces some stations to keep and operate channels they neither want nor need and reduces the channels available to forestall the economic disaster that other licensees will face if they lose their analog channels.

Broad authority for all licensees to follow the "flash-cut" alternative would free up additional channels to use by potentially displaced licensees. The Commission has long touted the advantages of market-based choices by licensees as a means to secure the public interest, and there is no convincing reason why it should not do so here and allow the voluntary choices of licensees to provide additional channel capacity to accommodate displaced analog licensees.

B. The Commission Can Provide That Stations on the Displacement Channels Will Be Granted Liberal Waivers of Existing Spacing and Interference Rules to Seek an Alternate Channel, Including the Use Through the Digital Transition of Any Unoccupied Channels in the 51-69 Band.

As discussed above, the Auction Reform Act of 2002 accorded the Commission broad authority to accommodate licensees displaced to accommodate public safety by spreading the impact of displacement so that stations displaced to face the allotted public safety spectrum do

not lose their analog service until the end of the transition and do not bear the full burden of selective displacement.[38] It remains only for the Commission to state that that it will use this authority and to prescribe how it will use this authority upon any displacement so that licensees dependent on continued over-the-air analog transmissions may assess their alternatives if, as appears likely, displacement occurs during the transition.

C. The Commission Should Use Auction Vouchers and Reverse Auctions as Market Mechanisms to Allocate Available Spectrum and Compensate Displaced Licensees Unable to Locate Channels Under the Commission's Liberal Waiver Policies.

To the extent the Commission cannot award displaced licensees substitute spectrum or otherwise accommodate a continuation of their analog service under the same terms as other market competitors, the Commission should compensate affected licensees through an auction voucher, a concept used in the *Qualcomm* pioneer preference proceeding. When intervening changes in the law impeded the award to Qualcomm of the preferred spectrum to which it was entitled under the pioneer program, Qualcomm filed a valuation of the designated spectrum and, as an alternative to awarding the specific spectrum, the Commission awarded a transferable "Auction Discount Voucher."[39] This voucher operated like a bidding credit to allow Qualcomm to obtain spectrum of its choosing or sell the voucher to make up for the loss of spectrum to which it had been entitled. The assignability of the voucher meant that it had a specific monetary

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[38] The Commission may waive the spacing requirements for analog broadcasting licensees within channels 2-51 and may waive requirements related to the table of allotments. The Commission may also waive the interference standards provided for digital broadcasting. Furthermore, the Commission may grant those waivers even if "such waiver or reduction [of spacing] would result in any degradation in or loss of service, or an increase level of interference to any television household." Auction Reform Act of 2002, Pub. L. No. 107-195, § 6(a), 116 Stat. 115, 117-118 (2002).

[39] *Qualcomm Inc.*, 16 FCC Rcd 4042 (2000).

value and could be sold to anyone participating in the Commission's auctions – that is, it had a dollar value. The Commission based the voucher concept on the provision of the Communications Act granting it authority to carry out its duties by taking "any and all actions" not inconsistent with that Act,[40] a provision that, according to the D.C. Circuit, authorized it to impose "a type of remedy for which there was no separate, specific statutory authorization."[41]

The auction voucher approach also could be used to free spectrum for displaced licensees through a "reverse auction," in which the auction voucher value would depend upon the willingness of a station in the DMA to agree to accept the auction voucher in exchange for making its own analog channel available to displaced incumbents or to agree to tolerate a level of interference great enough to allow use of an otherwise unavailable channel. Under this system, the Commission would set an auction date for each market in which all full service television licensees in the DMA with facilities covering the soon-to-be displaced incumbent's city of license with a city grade signal would be qualified to participate. The Commission progressively would increase the amount of the auction credit voucher to be awarded to the first accepting bidder. The first accepting bidder, if other than the displaced licensee, would commit to accept interference to permit the licensee to relocate to an otherwise unavailable channel or to abandon its analog channel and undertake all steps necessary to make that channel available for immediate use by displaced licensees no later than the displacement date. The auction credit voucher would be redeemable in any FCC spectrum auction and would be fully transferable, in whole or in part to any third party, with no expiration date.

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[40] *Qualcomm Inc.*, 16 FCC Rcd 4042 (2000), at ¶ 15, citing 47 U.S.C. 154(i).

[41] *Id.* at ¶ 15, citing *New England Telephone & Telegraph Co. v. FCC*, 826 F2d 1101, 1107 (D.C. Cir. 1987).

V. Conclusion

For the reasons set forth above, PCC urges the Commission to reconsider its *Order* and fulfill its statutory obligation to preserve over-the-air analog service through the end of the digital transition.

Respectfully submitted,

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